Re Jong Min Cheow; ex parte Standard Chartered Bank Malaysia Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PROCEEDINGS NO KCH-29PB-10–7 OF 2017
STEPHEN CHUNG J
13 FEBRUARY 2018

Bankruptcy — Discharge — Appeal by judgment creditors against discharge order — Whether report by Director General of Insolvency ('DGI') complete — Whether court bound to accept report — Whether DGI should carry full investigation of debtor's asset — Whether application for discharge should have been refused

The debtor was adjudged bankrupt on 4 May 2012 pursuant to a creditor's petition filed by Standard Chartered Bank Malaysia Bhd. In July 2017, the debtor applied under s 33(1) of the Bankruptcy Act 1967 and r 194 of the Bankruptcy Rules 1969 that the bankruptcy order be discharged. The senior assistant registrar had allowed the said application, hence the present appeal by the creditor namely Hong Leong Bank Bhd ('the creditor'). The creditor submitted that: (a) the Director General of Insolvency ('the DGI') did not set out in the DGI report ('the report') whether he carried out full investigation to ensure the bankrupt had no hidden assets; and (b) the court should not place total reliance on the report in granting absolute order of discharge because the report did not state whether the debtor would continue making payments, for how long and his future financial standing.

Held, allowing the appeal in terms with no order as to costs:

(1) Although the debtor was 70 years of age, unemployed and had no assets, he did not explain why he wanted or needed to be discharged as a bankrupt. He did not provide any plan or his intentions if he was to be discharged as a bankrupt (see para 14).

(2) In an application for discharge, the court shall take into consideration a report of the DGI and this was a mandatory requirement. Nevertheless, the court was not bound to accept it if the court was satisfied that the report was incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt (see para 15).

(3) In the present case, the report was not a complete report because the DGI did not investigate and did not address the following issues: (a) the discrepancy between the debtor's statement of affairs and the proofs of debt regarding the debtor's total liability; (b) although the debtor

admitted owing RM35,379.01 to Hong Leong Bank, there was no mention of a proof of debt filed by Hong Leong Bank in the report; (c) the report stated that Aiqon Direct Sdn Bhd filed a proof of debt for RM40,328.95 but this debt was no included in the debtor's statement of affairs; (d) the report stated that AmIsmic Bank had filed two proofs of debt but the debtor did not include AmIslamic Bank as a creditor in his statement of affairs; (e) there was no explanation why in para 13 of the report, in the table under column 'Jumlah Diperakui', it was stated as not certified; and (f) the report stated that the debtor's wife was a housewife and the debtor lived in the house owned by his wife but there was no explanation when she acquired the house; and whether the debtor bought the house and put it under her name or whether it was intended to defraud the creditors (see paras 16–22).

(4) Based on the debts admitted by the debtor amounting to RM4,772,559.21, the proofs of debt amounting to RM16,067,487.36 and the debtor's monthly contributions amounting to RM20,482.77 only, this sum would not be able to pay out a dividend of not less than fifty per centum to the creditors. The application for discharge should have been refused (see para 23).

(5) The court ordered that the operation of the order of discharge shall be suspended for five years until the debtor reached 75 years of age and he shall continue to pay the monthly RM100 to the DGI until he reached 75 years old. The debtor had been paying RM100 per month since June 2012. He did not say that he was not able to or could not pay this sum of RM100 per month. He did not say that it onerous, oppressive or unconscionable (see para 24).

[Bahasa Malaysia summary

Penghutang telah diisytiharkan bankrap pada 4 Mei 2012 berdasarkan satu petisyen pemiutang yang difailkan oleh Standard Chartered Bank Malaysia Bhd. Dalam bulan Julai 2017, penghutang memohon di bawah s 33(1) Akta Kebankrapan 1967 dan k 194 Kaedah-Kaedah Kebankrapan 1969 untuk pelepasan perintah kebankrapan. Penolong kanan pendaftar telah membenarkan permohonan tersebut, oleh itu, rayuan semasa telah difailkan oleh pemiutang iaitu Hong Leong Bank Bhd ('pemiutang'). Pemiutang berhujah bahawa: (a) Ketua Pengarah Insolvensi ('KPI') tidak menyatakan di dalam laporan KPI ('laporan tersebut') sama ada beliau telah menjalankan penyiasatan menyeluruh untuk memastikan bahawa si bankrap tidak mempunyai aset tersembunyi; dan (b) mahkamah tidak patut meletakkan sandaran penuh ke atas laporan tersebut dalam membenarkan perintah pelepasan mutlak kerana laporan tersebut tidak menyatakan sama ada penghutang akan tetap terus membuat bayaran, untuk berapa lama dan kedudukan keewangannya di masa hadapan.

Diputuskan, membenarkan rayuan mengikut terma-terma tanpa perintah untuk kos:

(1) Walaupun penghutang berusia 70 tahun, menganggur dan tidak mempunyai aset, namun dia tidak menerangkan kenapa dia ingin atau perlu dilepaskan sebagai seorang bankrap. Dia tidak menyatakan apa-apa perancangan atau niatnya jika dia dilepaskan sebagai bankrap (lihat perenggan 14).

(2) Di dalam permohonan untuk pelepasan, mahkamah hendaklah mengambil kira laporan KPI and ini adalah keperluan mandatori. Walau bagaimanapun, mahkamah tidak terikat untuk menerimanya jika mahkamah berpuashati bahawa laporan tersebut tidak lengkap dan tidak boleh dipercayai atau telah dibuat berdasarkan penyiasatan yang tidak lengkap terhadap kelakuan dan urusan si bankrap (lihat perenggan 15).

(3) Dalam kes semasa, laporan tersebut bukan merupakan laporan yang lengkap kerana KPI tidak menyiasat dan tidak menangani isu-isu berikut: (a) percanggahan antara penyata urusan penghutang dan bukti hutang mengenai jumlah liabiliti penghutang; (b) walaupun penghutang mengakui berhutang sebanyak RM35,379.01 kepada Hong Leong Bank namun laporan tersebut tidak ada menyebut mengenai bukti hutang yang difailkan oleh Hong Leong Bank; (c) laporan tersebut menyatakan bahawa Aiqon Direct Sdn Bhd memfailkan bukti hutang sebanyak RM40,328.95 tetapi hutang ini tidak termasuk dalam penyata urusan penghutang; (d) laporan tersebut menyatakan bahawa AmIsmic Bank telah memfailkan dua bukti hutang tetapi penghutang tidak memasukkan AmIslamic Bank sebagai pemiutang dalam pernyata urusannya; (e) tiada penjelasan mengapa di dalam perenggan 13 laporan tersebut, dalam jadual di bawah bahagian 'Jumlah Diperakui', dinyatakan sebagai tidak diperakui; dan (f) laporan tersebut menyatakan bahawa isteri penghutang adalah seorang suri rumah dan penghutang tinggal di rumah yang dimiliki oleh isterinya tetapi tidak ada penjelasan bila dia memperoleh rumah tersebut; dan sama ada penghutang membeli rumah tersebut dan meletakkannya di bawah nama isterinya atau sama ada ia bertujuan untuk menipu pemiutang (lihat perenggan 16–22).

(4) Berdasarkan hutang yang diakui oleh penghutang berjumlah RM4,772,559.21, bukti hutang berjumlah RM16,067,487.36 dan caruman bulanan penghutang berjumlah RM20,482.77 sahaja, jumlah ini tidak akan dapat membayar dividen tidak kurang daripada lima puluh peratus kepada pemiutang. Permohonan untuk pelepasan sepatutnya ditolak (lihat perenggan 23).

(5) Mahkamah memerintahkan agar perintah pelepasan tersebut digantung selama lima tahun sehingga penghutang mencapai usia 75 tahun dan dia akan terus membayar bayaran bulanan RM100 kepada KPI sehingga dia

mencapai 75 tahun. Penghutang telah membayar RM100 sebulan sejak Jun 2012. Dia tidak mengatakan bahawa dia tidak dapat atau tidak boleh membayar jumlah sebanyak RM100 sebulan tersebut. Dia tidak mengatakan bahawa ia membebankan, menindas atau tidak berpatutan (lihat perenggan 24).]

Notes

For a case on appeal by judgment creditors against discharge order, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3449.

Cases referred to

Abdul Murad bin Ahmad v OCBC Bank Malaysia Bhd [2015] MLJU 852; [2015] 1 LNS 699, HC (refd)

Lau Kah Lay & Anor; Ex P Cold Storage (M) Bhd, Re [2001] 6 MLJ 311; [2001] 3 CLJ 960, HC (refd)

Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors) [2011] 2 MLJ 218; [2010] 8 CLJ 680, CA (refd)

Mohana Sundari d/o M Subramaniam; Ex P United Prime Corp Bhd, Re [2004] 5 MLJ 227; [2004] 1 CLJ 624, HC (refd)

Public Bank Bhd v Choong Yew Wah [2014] 4 MLJ 559; [2014] 5 CLJ 695, CA (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 33, 33(1), (3), (4), (6)
Bankruptcy Rules 1969 r 194
Penal Code ss 421, 422, 423, 424

Stephanie Riseng (David Allan Sagah & Teng Advocates) for the creditor.
Gordon Tang (Tang Legal Practice) for the debtor.

Stephen Chung J:

[1] The debtor was a director of Jong Brothers United (M) Sdn Bhd ('the company') and one of the guarantors of the company in respect of banking facilities of RM5.8m granted by Standard Chartered Bank Malaysia Bhd ('SCB') to the company. SCB obtained judgment against the company and guarantors after they failed to pay the banking facilities.

[2] On 4 May 2012 the debtor was adjudged bankrupt pursuant to a creditor's petition filed by SCB.

[3] In July 2017, the debtor applied under s 33(1) of the Bankruptcy Act 1967 and r 194 of the Bankruptcy Rules 1969 that the bankruptcy order made

A on 4 May 2012 be discharged. The grounds of the application were set out in his affidavit in support of the application.

B **[4]** On 2 November 2017 the senior assistant registrar ('SAR') allowed the application with no order as to cost. This is the appeal by one of the creditors namely Hong Leong Bank Bhd ('creditor') against the decision of the SAR. The creditor submitted that the SAR had erred in law and in fact. This appeal is by way of rehearing.

C **[5]** Section 33(1) of the Act states that a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

D **[6]** Under sub-s (3), on the hearing of the application, the court shall take into consideration a report of the Director General of Insolvency ('DGI') as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may grant or refuse an absolute order of discharge or grant an order of discharge subject to any conditions with respect to earnings or income or his after-acquired property. E Subsections (1) and (3) must be read together with sub-ss (4) and (6) of s 33 of the Act.

[7] Based on a report prepared by DGI, on 31 May 2012, the debtor filed his statement of affairs listing his debts amounting to RM4,772,559.21 owing to F several creditors including SCB, HSBC Bank, Malayan Banking, Hong Leong Bank and Public Bank. The report showed that the creditors had filed proofs of debt amounting to RM16,067,487.36. The report also stated that the debtor has been paying RM100 per month to Insolvency since June 2012 which amounted to RM20,482.77.

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[8] The creditor submitted that the debtor was a director and involved in the management of the company which owed RM16,067,487.36 to the creditors and could not rely on the excuse that he was merely a guarantor. It was submitted that these should not absolve the debtor of his obligations to the H creditors. It was submitted that the interest of the public and commercial morality must be preserved at its highest level at all times otherwise it would send out a wrong message, citing the case of *Abdul Murad bin Ahmad v OCBC Bank Malaysia Bhd* [2015] MLJU 852; [2015] 1 LNS 699.

I **[9]** Although the report stated that the debtor has no asset, is physically unwell, has made regular payments and five years have lapsed since he was adjudged bankrupt, it was submitted that these were not justifiable grounds for discharge from bankruptcy. It was submitted that the DGI carried an onerous task to ensure the bankrupt had no hidden assets and should carry a full

investigation. It was submitted that the DGI must not simply accept statements from the bankrupt and or his family. It was submitted that the DGI did not set out in his report whether he carried out any such investigation, citing the case of *Re Lau Kah Lay & Anor; Ex P Cold Storage (M) Bhd* [2001] 6 MLJ 311; [2001] 3 CLJ 960.

[10] It was submitted that total reliance on the report should not be made by the court in granting absolute order of discharge. It was submitted that whilst the report was beneficial in furnishing information on his conduct and his consistent payment, it did not state whether the debtor would continue making payments, for how long and his future financial standing. It was submitted that the monthly payment of RM100 which amounted to RM20,482.77 was insufficient to set off the debt owing and that the debtor has yet to settle the debts owing to so many creditors. It was submitted that therefore it was unfair and prejudicial to discharge the debtor from further obligations.

[11] Counsel for the debtor submitted that the debtor did not commit any offence under the Act or under ss 421, 422, 423 or 424 of the Penal Code and that his conduct during and throughout his bankruptcy has been satisfactory. It was submitted the debtor has co-operated fully with DGI and has complied with their requirements to the best of his ability in the management of his bankruptcy and financial affairs.

[12] It was submitted that at the time of the application, the debtor was 70 years of age, unemployed and his wife is a housewife. It was submitted that DGI made investigations with various agencies which revealed that the debtor has no asset or property. The debtor has agreed to pay monthly contributions of RM100 into his account with DGI since 2012 and that these amounted to RM20,482.77 to be paid out as dividends to the creditors.

[13] It was submitted that based on the above factors, the SAR did not err and was right to discharge the debtor unconditionally.

[14] Although the debtor is 70 years of age, unemployed and has no asset, he did not explain why he wanted or needed to be discharged as a bankrupt. He did not provide any plan or his intentions if he was to be discharged as a bankrupt.

[15] In an application for discharge, the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. However, the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made

based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge: *Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors)* [2011] 2 MLJ 218; [2010] 8 CLJ 680; *Public Bank Bhd v Choong Yew Wah* [2014] 4 MLJ 559; [2014] 5 CLJ 695.

[16] Firstly, the debtor in his statement of affairs listed his total liability at RM4,772,559.21 to several banks including Hong Leong Bank and SCB. However, based on the proofs of debt, his total liability amounted to RM16,067,487.36. There was no explanation given both by the debtor and DGI on this discrepancy and why there was such a big difference in the two figures.

[17] In his statement of affairs, although the debtor admitted owing RM35,379.01 to Hong Leong Bank, there was no mention of a proof of debt filed by Hong Leong Bank in the report of DGI. During the bankruptcy proceedings, Hong Leong Bank was represented by advocates. There was no explanation whether Hong Leong Bank filed any proof of debt or DGI inadvertently omitted it in the report.

[18] In the report, Aiqon Direct Sdn Bhd filed a proof of debt for RM40,328.95 which was 'Jumlah Diperakui' but this debt was not included in the debtor's statement of affairs. There was no explanation by the debtor or DGI.

[19] In the report, AmIslamic Bank filed two proofs of debt which amounted to more than RM11m. The debtor did not explain whether he owed or disputed the RM11m to AmIslamic Bank since he did not include AmIslamic Bank as a creditor in his statement of affairs. There was also no such explanation by DGI in his report.

[20] In para 13 of the report, in the table under column 'Jumlah Diperakui', it was stated as 'belum diperakui' or not certified. There was no explanation why it was not certified or whether there was no supporting or insufficient documents to substantiate the proofs of debt. There was no explanation why it took so long not to certify or to approve or to reject the proofs of debt since the debtor was adjudged bankrupt on 4 May 2012, bearing in mind the debtor was a director of the company which was placed under receivership on 7 September 2010 on the application of AmIslamic Bank.

[21] Further, the report stated that the wife was and is a housewife and the debtor lived in the house owned by his wife. There was no explanation when she acquired the house, whether it was within the three years immediately

preceding his bankruptcy, from what means or sources and whether she could afford the house since she is at all times a housewife. There was no explanation whether the debtor bought the house and put it under her name or whether it was intended to defraud the creditors.

[22] DGI did not investigate and did not address these issues and therefore the report was not a complete report.

[23] Based on the debts admitted by the debtor amounting to RM4,772,559.21, the proofs of debt amounting to RM16,067,487.36 and his monthly contributions amounting to RM20,482.77 only, this sum will not be able to pay out a dividend of not less than fifty per centum to the creditors. The application for discharge should have been refused.

[24] Based on his age, the operation of the order of discharge shall be suspended for five years until he reaches 75 years of age and he shall continue to pay the monthly RM100 to DGI until he reaches 75 years old. The debtor has been paying RM100 per month since June 2012. He did not say that he was not able to or could not pay this sum of RM100 per month. He did not say that it onerous, oppressive or unconscionable: see *Re Mohana Sundari d/o M Subramaniam; Ex P United Prime Corp Bhd* [2004] 5 MLJ 227; [2004] 1 CLJ 624.

[25] The appeal is allowed in terms above. No order as to costs.

Appeal allowed in terms with no order as to costs.

Reported by Dzulqarnain Ab Fatar